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No. 01-400

In The Supreme Court Of The United States

RICKY BELL, Warden,

Petitioner,

v.

GARY BRADFORD CONE,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF OHIO AND 22 OTHER STATES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

INTEREST OF THE *AMICI* STATES 1

SUMMARY OF ARGUMENT 2

ARGUMENT

I. The Court Of Appeals Wrongly Granted Habeas Relief On The Respondent's Sixth Amendment Claim. 3

A. The Court Misapplied The Relevant Test Under AEDPA. 4

B. The Court Wrongly Omitted The *Strickland* Prejudice Inquiry. 6

II. Too Often, The Federal Courts Simply Substitute Their Judgments For Those Of The State Courts On *Strickland*'s Second Prong In Capital Cases 7

CONCLUSION 12

TABLE OF AUTHORITIES

Cases **Page**

Burger v. Kemp,
483 U.S. 776 (1987).....8

Carter v. Bell,
218 F.3d 581 (6th Cir. 2000).....8

Coleman v. Mitchell,
268 F.3d 417 (6th Cir. 2001).....8

Cone v. Bell,
243 F.3d 961 (6th Cir. 2001).....11

Darden v. Wainwright,
477 U.S. 168 (1986).....8

Groseclose v. Bell,
130 F.3d 1161 (6th Cir. 1997), *cert. denied*,
523 U.S. 1132 (1998).....8

Penry v. Johnson,
121 S. Ct. 1910 (2001).....5

Roe v. Flores-Ortega,
528 U.S. 470 (2000).....6

Sawyer v. Whitley,
505 U.S. 333 (1992).....7

Smith v. Robbins,
528 U.S. 259 (2000).....6

Strickland v. Washington,
466 U.S. 668 (1984).....*passim*

United States v. Cronic,
466 U.S. 648 (1984).....6, 7

Williams v. Taylor,
529 U.S. 362 (2000).....5, 9, 11

Statutes

28 U.S.C. 2254(d).....5, 9

INTEREST OF THE *AMICI* STATES

The 23 amici States write to urge the Court to reverse the judgment of the court of appeals. The States naturally have a strong interest in seeing that the final judgments of state courts in criminal cases are overturned only in the rarest of federal habeas cases, and that is particularly true where, as in this case, state appellate or post-conviction courts have made factual findings in the course of denying a prisoner's claims. The decision below granting federal habeas relief to a state prisoner chips away at the notion that federal courts should accord considerable deference to the judgments of state courts in criminal cases, and that decision runs counter to federal habeas principles that both the Congress and this Court have embraced.

And because state prisoners – like the respondent in this case – so often raise ineffective-assistance-of-counsel claims in their federal habeas petitions, the Court's decision in this case will affect a large number of the habeas cases to which state attorneys general must respond in the federal courts. The States earnestly seek guidance on the proper scope of the Sixth Amendment's protection, and we urge the Court to give that guidance in this case. The court below skipped over the *Strickland* prejudice inquiry, which we view as a critically important – and sensible – part of the proper analysis of Sixth Amendment claims, and the States therefore urge the Court to cabin more tightly the narrow class of cases in which the federal courts may simply presume prejudice in the way that the court of appeals did here, and we ask the Court to spell out the kind of objective criteria that the federal courts should apply in resolving ineffective-assistance claims like this one.

SUMMARY OF ARGUMENT

Though the state court of appeals held in this prisoner's case that "[n]o stone was left unturned" by state trial counsel, and though that court cited "overwhelming evidence" to support the jury's verdict finding the prisoner guilty and sentencing him to death, the Sixth Circuit has brushed aside the state court's findings and has vacated the death sentence. The federal court of appeals has done so even though Tennessee has sensibly argued that no matter whether defense counsel at trial performed splendidly or otherwise, the prisoner cannot show that he suffered any prejudice from his lawyer's alleged shortcomings. Lawyering praised in the state appellate court in this case has now been condemned by the Sixth Circuit, and the federal court of appeals has added the lawyer's conduct in this case to the formerly-narrow class of misconduct for which prejudice may be presumed.

The judgment of the court of appeals should be reversed. This Court's decision in *Strickland v. Washington*, 466 U.S. 668 (1984), has long required that any convicted criminal defendant who alleges a Sixth Amendment violation must show a reasonable probability that the outcome of his trial or appeal would have been different had counsel handled the case in some other way. That "prejudice" requirement is a critical part of the analysis, and it should be skipped only in the rare case in which defense counsel has done *nothing* to help his client. That is not what happened here.

And once a state post-conviction or appellate court presented with a Sixth Amendment claim has examined and rejected any challenges to defense counsel's strategic choices and the propriety of them, the federal habeas courts ought not later second-guess the state court's factual findings. That is the thrust of AEDPA and of this Court's recent interpretation of key language in that statute. Deciding how a jury might

have reacted to additional evidence or argument had it been offered by defense counsel at trial is surely not easy, but the important state interest in the finality of convictions counsels against a whole new assessment by the federal courts of that fact-intensive issue once the state courts have decided that the extra effort by defense counsel would not have made any difference. AEDPA directs that the federal courts should stand aside in those cases, absent some objective evidence that the state court acted unreasonably in resolving the question.

Because the court of appeals in this case declined to give appropriate deference to state court findings about the work of this prisoner's trial lawyer, and because the court of appeals vacated the prisoner's death sentence without requiring him to show that the allegedly deficient performance of his trial lawyer had any effect on the outcome of his case, the court of appeals went beyond the limits set by this Court and by Congress on the federal courts' power to undo state-court convictions and sentences. The judgment should be reversed.

ARGUMENT

I. The Court Of Appeals Wrongly Granted Habeas Relief On The Respondent's Sixth Amendment Claim.

The Sixth Circuit erred in two critical ways in undoing the state court's decision in this case. First, the court of appeals failed to give to the state court findings the level of deference that they deserve under AEDPA. Second, the court of appeals improperly presumed that this prisoner was harmed by his trial lawyer's conduct without requiring him to show that his lawyer's strategic choices likely had an

effect on the jury's decision to recommend a death sentence for him.

A. The Court Misapplied The Relevant Test Under AEDPA.

The Tennessee Court of Criminal Appeals examined the respondent prisoner's post-conviction Sixth Amendment challenge to his trial lawyer's work, and that court found no support for the prisoner's claim that his trial lawyer should have handled the case differently. According to the Tennessee appellate court, defense counsel at trial (who testified at a post-conviction hearing in a Tennessee trial court about his strategic choices in this case) sensibly concluded that he need not present during the penalty phase the same testimony that he had offered during the guilt phase, and "nothing in the record" suggested that additional witnesses during the penalty phase "would have benefited the defense," according to the state court of appeals. Pet. App. 108-109.

As for the prisoner's post-conviction claim that his trial lawyer should not have waived his penalty-phase closing argument, the state appellate court found that defense counsel had made a reasonable choice in waiving argument. The lawyer had done so after hearing the prosecutor's "low-key" initial closing argument, and once defense counsel waived his argument, the prosecutor was thereby denied the opportunity to present to the jury the kind of "devastating" final closing argument for which he was well known. This was a "legitimate trial tactic" on defense counsel's part, according to the state court of appeals. Pet. App. 110.

Applying the familiar analysis from *Strickland v. Washington*, 466 U.S. 668 (1984), the state court of appeals not only examined whether defense counsel's performance was deficient, but also asked whether defense counsel's

alleged shortcomings actually had any effect on the outcome of the trial's penalty phase. They did not have that effect in this case, according to the state appellate court, because of the "overwhelming evidence" against the respondent at trial. Pet. App. 111.

The AEDPA statute directs the federal habeas courts to leave in place any state court judgment on the merits of a constitutional claim unless the state court decision "involved an unreasonable application of[] clearly established law." 28 U.S.C. 2254(d)(1). A state court judgment that is simply "incorrect" in its application of federal law ought not prompt a federal court to undo that judgment, *Williams v. Taylor*, 529 U.S. 362, 412 (2000), because "even if the federal habeas court concludes that the state court decision applied clearly established federal law incorrectly, relief is appropriate only if that application is also objectively unreasonable." *Penry v. Johnson*, 121 S. Ct. 1910, 1918 (2001).

The judgment of Tennessee's appellate court – resting as it did on this Court's *Strickland* decision, and simply applying the holding of that case to the particular facts of this one – should have survived AEDPA's deferential standard of review. The whole thrust of 28 U.S.C. 2254(d) is that prisoners who secure a state-court ruling on the merits of a constitutional claim should rarely be able to undo that ruling in a later federal habeas proceeding. State courts are well able to apply settled federal law to particular facts, and only when they do so in a way that is clearly at odds with essential principles announced by this Court may a federal habeas court second-guess a state court's conclusion. The court of appeals surely overstepped AEDPA's limits by vacating the death sentence in this case.

B. The Court Wrongly Omitted The *Strickland* Prejudice Inquiry.

The second question in the petition likewise identifies another error committed by the court of appeals. By skipping over the second prong of *Strickland* that requires a criminal defendant to "show that the deficient performance [of counsel] prejudiced the defense," *Strickland*, 466 U.S. at 687, the court of appeals expanded the narrow class of cases in which this Court has likewise skipped over that part of the ineffective-assistance test. And by doing so, the court of appeals effectively avoided wrestling with the factual findings and legal conclusions of Tennessee's court of criminal appeals, which had earlier rejected any suggestion that this prisoner was harmed by his lawyer's actions.

The presumption of prejudice that the court of appeals applied in this case should be reserved for those rare circumstances in which the defendant had no counsel at all, or where defense counsel had a conflict of interest. See *Roe v. Flores-Ortega*, 528 U.S. 470, 483 (2000) (explaining that a "presumption of prejudice" applies when "the adversary process itself has been rendered presumptively unreliable" as a result of "the complete denial of counsel during a critical stage of a judicial proceeding") (quotations omitted); *Smith v. Robbins*, 528 U.S. 259, 287 (2000) (explaining that there are "three categories of cases" in which courts should "presume prejudice rather than require a defendant to demonstrate it": outright denial of counsel, state interference with counsel's assistance, and an actual conflict of interest on the part of defense counsel).

That kind of prejudice presumption first outlined in *United States v. Cronic*, 466 U.S. 648 (1984), should not be extended to cover cases like this one, in which defense counsel fought hard for the accused throughout the trial, making tactical choices that he felt were reasonable, and

which were always motivated by his efforts to serve the client well. The adversary process certainly did not break down in this case, and indeed defense counsel's tactical choice to waive closing argument – a choice that the state post-conviction court found sensible – was designed to thwart an expected strong closing argument by the prosecutor. That strikes us as the epitome of vigorous representation, not a breakdown in the adversarial process.

II. Too Often, The Federal Courts Simply Substitute Their Judgments For Those Of The State Courts On *Strickland*'s Second Prong In Capital Cases.

The States urge the Court to address in this case an issue on which we earnestly seek guidance: The kind of analysis that federal habeas courts ought to apply when weighing whether counsel's performance at the penalty phase of a capital trial has prejudiced the defendant.

In this case, the court of appeals should have asked whether defense counsel's tactical choices to omit some mitigating evidence and to skip presentation of a penalty-phase closing argument had some impact on the jury's verdict recommending a death sentence. The court of appeals did not examine the question, and that was wrong, for the "right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial." *Cronic*, 466 U.S. at 658.

But to be sure, the task of deciding that question is a "difficult" one, requiring a reviewing court to assess "how jurors would have reacted to additional showings of mitigating factors" or arguments not presented. *Sawyer v. Whitley*, 505 U.S. 333, 346 (1992). The range of evidence that a jury may consider in the penalty phase of a capital trial is broad, and at that stage in particular, the variety of

reasonable choices that competent lawyers may make is perhaps at its greatest, with no two lawyers likely to agree entirely on the exact mix of witnesses and evidence that just may prompt a wavering juror to vote to spare the defendant's life.

The temptation for reviewing courts to second-guess the choice or choices made by defense counsel at the penalty phase is therefore high even when the courts ask – as they should – whether defense counsel's choices affected the trial's outcome. The frequency with which the Sixth Circuit alone has vacated death sentences based on alleged Sixth Amendment violations bears that out. See, e.g., *Coleman v. Mitchell*, 268 F.3d 417 (6th Cir. 2001) (vacating death sentence because counsel should have investigated and presented evidence about the defendant's troubled childhood and low IQ); *Carter v. Bell*, 218 F.3d 581 (6th Cir. 2000) (vacating death sentence because counsel should have presented evidence about the defendant's violent upbringing, limited schooling and his positive relationships with family members); *Groseclose v. Bell*, 130 F.3d 1161 (6th Cir. 1997) (vacating death sentence because counsel should have presented evidence about the defendant's law-abiding life, his church activities and his military record), *cert. denied*, 523 U.S. 1132 (1998).

Yet the second part of *Strickland*'s test need not always prompt reviewing courts to second-guess the choices made by defense counsel at the penalty phase of a capital trial. See, e.g., *Burger v. Kemp*, 483 U.S. 776, 788 (1987) (leaving death sentence in place, even though defense counsel "offered no mitigating evidence at all"); *Darden v. Wainwright*, 477 U.S. 168, 184-86 (1986) (leaving death sentence in place, despite counsel's short preparation time and despite his tactical decision to rely simply on a plea for mercy from the defendant). The uncertainty of the federal courts about their duty to revisit state-court rulings like the

one in this case now prompts us to urge the Court to more clearly define the way in which courts should decide whether "counsel's errors were so serious as to deprive the defendant of a fair trial." *Strickland*, 466 U.S. at 687.

The very fact that different lawyers would almost inevitably make different choices in any given case ought to signal both state and federal courts to tread cautiously down the road that the court of appeals walked in this case. Convicted prisoners can almost always point to some piece of information about their often very troubled lives that defense counsel never shared with the jury, or a scientific analysis of a relevant physical or mental disorder about which the jury never heard, or a particular witness whose testimony might have swayed a juror had the witness been called at trial. The *Strickland* prejudice inquiry can very quickly turn into a free-wheeling analysis of defense counsel's every move at the mitigation hearing.

That ought not happen. AEDPA directs the federal courts to undo only the "unreasonable application" of federal law by state courts, or the "unreasonable determination of the facts" in those fora. 28 U.S.C. 2254(d). The inquiry should not be turned "into a subjective one." *Williams v. Taylor*, 529 U.S. at 410. And because there is little objective support for the view that a competent defense attorney necessarily *must* present some particular piece of evidence during the penalty phase, or that he or she *must* always do so in a particular way, we find little support for the kind of we-know-it-when-we-see-it approach to ineffective-assistance claims that some federal courts have applied in vacating death sentences.

Here, the state court of appeals rejected the prisoner's Sixth Amendment claim on both the deficient-performance and prejudice prongs of *Strickland*. Certainly the Sixth Circuit should have likewise examined both prongs, rather

than skipping over the latter. Had the court of appeals applied the right test, it would have found no objective basis for disagreeing with the state court's conclusions. No objective evidence points toward a reasonable probability that the jury (1) would have reached a different outcome had defense counsel introduced certain mitigating evidence during the penalty phase (particularly given that the lawyer had already introduced most of that evidence during the guilt phase), or (2) would have voted for a life sentence if defense counsel had opted to present a closing argument (and the jury had perhaps then heard the devastating closing argument that defense counsel expected the prosecutor to offer in response).

The analysis is not an easy one, but as things stand now, some federal courts continue to stray too far afield from the narrow confines that AEDPA and *Strickland*'s second prong give them in these Sixth Amendment cases. Federal courts ought not undo state-court convictions and sentences just because federal judges think that defense counsel could or should have done some things differently during the penalty phase of a capital trial. Any obscure fact about the defendant's personal troubles, and every seemingly unconnected facet of the defendant's childhood can later be seized on by the prisoner as the magic missing piece that would have led to a different trial outcome at the penalty phase, and all too often, the unpredictability of the outcome in federal habeas cases frustrates the parties (and perhaps the courts as well).

We think the better approach is one that focuses on any of several objective tests. The States earnestly strive to ensure fairness in both state-court trials and in their later post-conviction review proceedings. The more definite and objective is the federal-court process for reviewing state-court decisions rejecting ineffective-assistance claims, the

more all parties can feel that they have received a fair hearing on the merits of those claims.

Perhaps federal habeas review of ineffective assistance claims like this one should focus on whether defense counsel omitted mitigating evidence about the crime itself and about the defendant's reasons for committing the crime (as opposed to the lawyer's handling of more remote mitigating information such as a defendant's long-ago childhood troubles), or perhaps federal courts should ask whether defense counsel might have had any reasonable basis for handling the penalty phase as he or she did (doing so, as in this case, with the benefit of defense counsel's own post-trial explanation, where available, and relying heavily on the state courts' assessment of the reasonableness of counsel's strategy), or perhaps the courts should compare the jury's handling of the evidence presented in any given case with the outcomes in similar cases involving comparable types of available mitigating evidence.

In any event, the Sixth Circuit's approach in this case – "reject[ing] out of hand" the state appellate court's conclusions, *Cone v. Bell*, 243 F.3d 961, 979 (6th Cir. 2001) – cannot be squared with the deference owed those conclusions under AEDPA, or with the requirement that habeas relief should be granted on an ineffective-assistance claim only when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Williams v. Taylor*, 529 U.S. at 413-14, quoting *Strickland*, 466 U.S. at 694. Once Tennessee's courts found neither deficient performance by defense counsel nor prejudice from that performance, the federal habeas courts should have left the defendant's sentence in place, absent some kind of objective evidence that the lawyer's efforts deprived this prisoner of the fair trial to which he was entitled. That showing was surely lacking

here, and therefore the court of appeals erred in setting aside the jury's verdict.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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